

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 380/2004

Smt. Conceicao Maria Pereira
Fernandes, C/o. Dr. Francis
Fernandes, Sea View, Near M.P.T.
Hospital, 2nd Floor, Vasco-da-Gam, Goa. Petitioner.

V/s.

1. Shri Anthony Fernandes,
major and his wife;
2. Smt. Annie Fernandes,
major, r/o. Goletin,
Saligao, Bardez, Goa.
3. Mrs. Nasissa Fernandes
major and her husband.
4. Mr. John Elias Fernandes,
major and both r/o Goletin,
Saligao, Bardez, Goa.
5. Master Pascoal Fernandes,
major, bachelor and
6. Master Ashley Fernandes
major, bachelor, both resident
of Goletin, Saligao, Bardez, Goa. Respondents.

Mr. Nitin Sardessai, Advocate for the petitioner.

Mr. Joseph Vaz, Advocate for respondents No.1 and 2.

CORAM : A.P. LAVANDE, J.

DATE : 8th April, 2005.

ORAL JUDGMENT :

Heard Mr. Sardessai, learned Counsel for the petitioner and Mr. Vaz, learned Counsel for respondents No.1 and 2. Respondents No.3 to 6 though served, have chosen not to put in their appearance. Rule. By consent of the learned Counsel appearing for the parties, heard forthwith.

2. By this petition, the petitioner takes exception to Order dated 2nd July, 2004, passed by the IInd Addl. District Judge, Panaji in Civil Misc. Application No.244/03, dismissing the application filed by the petitioner and respondents No.5 and 6 herein, seeking condonation of delay of 11 days in filing the appeal against the Judgment and Decree passed in Regular Civil Suit No. 170/93 by the trial Court. The lower appellate Court, after hearing the learned Counsel for the parties, refused to condone the delay of 11 days in filing the appeal.

3. Mr. Sardessai, learned Counsel appearing for the petitioner

states that the lower appellate Court has committed jurisdictional error in not condoning the delay although there was sufficient cause for condoning the delay of 11 days in filing the appeal. The learned Counsel submitted that it is well settled by catena of decisions of the Apex Court that power to condone the delay must be liberally exercised. According to the learned Counsel, the lower appellate Court has not exercised the jurisdiction in accordance with law laid down by the Apex Court while considering the application for condonation of delay. Mr. Vaz, learned Counsel appearing for the respondents No.1 and 2 submitted that no fault could be found with the impugned order.

4. I have considered the submissions made by the learned Counsel for the parties. By now it is well settled by catena of decisions of the Apex Court that the power to condone the delay must be liberally exercised and unless there is absolute negligence on the part of a party, the delay in filing the appeal must be condoned. From the records, I find that sufficient cause was made out by the petitioner and respondents No.5 and 6, who were the appellants before the lower appellate Court, for condoning the delay of 11 days in filing the appeal. Therefore, I find that the lower

appellate Court has exercised the jurisdiction illegally by not condoning the delay. By not condoning the delay, serious prejudice has been caused to the appellants before the lower appellate Court.

5. Accordingly, the impugned Order dated 2nd July, 2004 passed by the IInd Addl. District Judge, Panaji in Civil Misc. Application No.244/2003 is quashed and set aside, subject to payment of costs of Rs.1,000/- in favour of the contesting respondents only i.e. respondents No.1 and 2 herein. The delay of 11 days in filing the appeal is condoned. The petitioner shall deposit the costs of Rs.1,000/- within a period of four weeks from today in the Registry of District Court, at Panaji and, thereafter, respondents No.1 and 2 will be at liberty to withdraw the said amount.

Rule is made absolute in the aforesaid terms. Parties to bear their own costs.

A.P. LAVANDE, J.

ssm.